

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

Bels

77-6160

To be argued by
GENE CRESCENZI

In The
United States Court of Appeals
For The Second Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

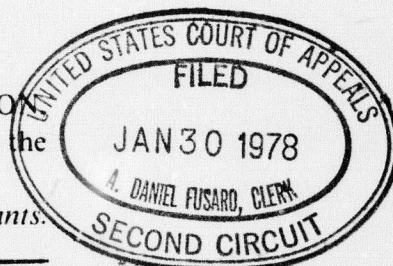
-against-

HELEN K. TASSOP d/b/a ST. ANDREW ACADEMY ON
THE SOUND, and TASSOP REALTY, INC.,
Defendants-Appellants,

-and-

ASTORIA FEDERAL SAVINGS & LOAN ASSOCIATION
and ESTELLE LEIBOWITZ LUNGO, as Executrix of the
Estate of HOWARD LEIBOWITZ,

Defendants.



BRIEF FOR DEFENDANTS-APPELLANTS

GENE CRESCENZI
Attorney for Defendants-Appellants
415 Lexington Avenue
New York, New York 10017
(212) 682-1686

TABLE OF CONTENTS

	<u>Page</u>
SUMMARY	I
PART I STATEMENT OF FACTS	1
PART II RELIEF FROM JUDGMENT ENTERED	
7 FEBRUARY, 1976 AND FROM THE	
STIPULATION DATED FEBRUARY 6, 1976	11
PART III VIOLATION BY THE IRS OF THE LAWS,	
REGULATIONS AND PROCEDURES	
PERTAINING TO COLLECTION OF TAXES	
AND LIENS	19
PART IV OPPOSITION TO THE MOTION OF PLAINTIFF	
FOR A DECREE OF FORECLOSURE AND	
JUDICIAL SALE AND THAT THE COURT	
MAY RELIEVE DEFENDANT FROM THE	
ORDER OF THIS COURT OF MAY 27, 1976	38
PART V STATEMENT OF ACCOUNTS	47
PART VI DEFENDANT WAS DEPRIVED OF HER	
CONSTITUTIONAL RIGHT TO A FAIR TRIAL	54
PART VII A SCHEME TO CLOSE ST. ANDREW ACADEMY	59
PART VIII PUBLIC LAW AND POLICY RESPONSIVE TO	
TREATIES ARE THE SUPREME LAW OF THE	
LAND. (UNITED STATES CONSTITUTION,	
ARTICLE 6, SECTION 2)	62
PART IX THE UNITED STATES OF AMERICA IS A GUARANTOR	
OF SCHOOLS OPERATED UNDER THE DIRECTION OF	
ITS RECOGNIZED RELIGIOUS INSTITUTIONS	64
CONCLUSION	67

INDEX OF CASES CITED

	<u>Page</u>
1. 4 ALR Fed 537	15
2. <u>George S. Colton Elastic Web Co. v. White</u> (1936, DC Mass) 16 F Supp 726	16
3. <u>George S. Colton Elastic Web Co. v. White</u> (1938, DC Mass) 23 F Supp 761	17
4. <u>First Nat. Bank & T. Co. v. Jones</u> (1945, DC Okla) 61 F Supp 364	17
5. <u>Commissioner v. Chase Manhattan Bank.</u> (1958, CA5 Tex) 259 F2d 231, cert den 359 US 913, 3 L Ed 2d 575, 79 S Ct 589	17
6. <u>Brast v. Winding Gulf Colliery Co.</u> (1938, CA4 W Va) 94 F2d 179	17
7. <u>Thornton v. U.S.A., U.S.D.C., Eastern District, Pa., Civil Action 72-1259,</u> 1/22/73, 1973 Standard Federal Tax Reports 80, 422.	26
8. <u>Darnell v. Tomlinson</u> [55-1 USTC § 9337] 220 F. 2d 894, (5th Cir. 1955)	28
9. <u>United States v. Pavenick</u> 107 F. Supp. 257 (1961)	32
10. <u>United States v. Coson,</u> 61-1 U.S.T.C. §9219 (9th Cir. 1962)	33
11. <u>Bessie A. Mrizek and John R. Mrizek v. H. Alan Long, District Director of Internal Revenue for the Chicago District, Chicago, Illinois,</u> 187 Federal Supp. 830	33
12. <u>Communist Party U.S.A. v. Moysey,</u> 141 Fed. Supp. 332 (S.D.N.Y., 1956) [56-2 USTC, § 9625]	35
13. <u>Raffaele v. Granger,</u> 3 Cir., 1952, 196. Fed.2d 620, 622 [52-1 USTC § 9321]	35
14. <u>Midwest Haulers, Inc. v. Brady,</u> 6 Cir., 1942, 128 F. 2d 496 [42-2 USTC § 9550]	35

	<u>Page</u>
15. <u>John M. Hirst & Co. v. Gentsch</u> , 6 Cir., 1943, 133 F. 2d 247 [43-1 USTC § 9356]	35
16. <u>Hill v. Wallace</u> , 259 U.S. 44, 42 S. Ct. 453, 66 L. Ed. 822 [1 USTC § 65]	35
17. <u>Lipke v. Lederer</u> , 259 U.S. 557, 42 S. Ct. 549 66 L. Ed. 1061 [1 USTC § 67]	35
18. <u>Regal Drug Corporation v. Wardell</u> , 260 U.S. 386, 43 S. Ct. 152, 67 L. Ed. 318 [1922 CCH § 2074]	36
19. <u>Allen v. Regents of the University System</u> . . . <u>of Georgia</u> , 304 U.S. 439, 58 S. Ct. 980, 82 L. Ed. 1448 [38-2 USTC § 9321]	36
20. <u>Miller v. Standard Nut Margarine Company</u> <u>of Florida</u> , 284 U.S. 498, 52 S. Ct. 260, 78 L. Ed. 422 [3 USTC § 878]	36
21. <u>Mitsukiyo Yoshimura v. Alsup</u> , 9 Cir., 1948, 167 F. 2d 104 [48-1 USTC § 9234]	36
22. <u>Homan Mfg. Co., Inc. v. Long</u> , 264 F. 2d 158 (1959) [59-1 USTC § 9269]	36
23. <u>Melvin Building Corp. v. Long</u> 262 F. 2d 920 (1959) [59-1 USTC § 9126]	36
24. <u>Mensik v. Long</u> , 261 F. 2d 45 (1958) [58-2 USTC § 9943]	36
25. <u>Steiner v. Nelson</u> , 259 F. 2d 853 (1958) [58-2 USTC § 9871]	36
26. <u>Homan Mfg. Co., Inc. v. Long</u> , 242 F. 2d 645 (1957) [57-1 USTC § 9372]	36
27. <u>Tovar v. Jarecki</u> , 173 F. 2d 449 (1949). [49-1 USTC § 9218]	36
28. <u>Tomlinson v. Smith</u> , 128 F. 2d 808 (1942). [42-2 USTC § 9540]	36

	<u>Page</u>
29. <u>United States v. O'Connor</u> (1961, CA2 NY) 291 F2d 520, 100 ALR2d 858	41
30. <u>Pipola v. Chicco</u> (1960, CA2 NY) 274 F2d 909	41
31. <u>United States v. Acri</u> (1952, DC Ohio) 109 F Supp 943, Affd (CA6) 209 F2d 258, revd on other grounds 348 US 211, 99 L Ed 264, 75 S. Ct. 239	42
32. <u>United States v. Ridley</u> (1954, DC, Ga) 127 F Supp 3	42
33. <u>United States v. Rindskopf</u> (1879, CC Wis) 1 Biss 507, F Cas No. 16166	43
34. <u>Falik v. United States</u> (1962, DC NY) 206 F. Supp. 181	43
35. <u>Sonitz v. United States</u> (1963, DC NJ) 221 F Supp 762	44
36. <u>Petition of Green, Ohio</u> 1962, 82 S.Ct. 1114, 369 U.S. 689, 8 L.Ed. 2d 198	56
37. <u>Petition of Curtis, D.C.Mo.</u> 1965, 240 F.Supp. 475, affirmed 362 F.2d 999, certiorari denied 87 S.Ct. 857, 386 U.S. 914, 17 L.Ed 2d 787, rehearing denied 87 S.Ct. 2072, 387 U.S. 949, 18 L.Ed. 2d 1341	56

SUMMARY

1. This is an appeal from the judgment of the United States District Court, Eastern District of New York, dated July 27, 1977, for the foreclosure of federal tax liens and the judicial sale of the real property in the name of Tassop Realty Inc. which is housing St. Andrews Academy on the Sound, situated in Queens County, N.Y., and also an appeal from the order of the same court dated July 27, 1977, in which the same court amended the judgment entered on February 7, 1976, as amended on May 27, 1976, by affirming the consent judgment under which "the plaintiff, the United States of America, recover of the defendant, Helen K. Tassop, d/b/a the St. Andrew Academy of the Sound, the sum of \$263,992.37, with interest thereon, as provided by the law."

2. This appeal is made on the following grounds:

- A) The United States District Court erred in rejecting the submissions of defendant-appellant for granting the defendant-appellant relief from the judgment of the United States District Court of February 7 and May 27, 1976 without taking notice of the important legal grounds and controlling decisions raised in the defendant-appellant's Memorandum of Law submitted to the District Court.
- B) The District Court did not take into consideration the established facts which were before the court that defendant-appellant agreed to the stipulation dated February 6, 1976 by mistake,

inadvertence, excusable neglect and intrinsic and extrinsic misrepresentation by the previous attorney of defendant-appellant, Peter Newman, and by the attorney of the plaintiff.

The attorney of plaintiff-respondent, J. Brian Ferrel, as appears on page 356a of the Record of Appeal, on cross examination, made a statement which was untrue and he knew it was untrue. The text is as follows:

"Q You mean to obtain what you wanted you put a statement on the record that was patently untrue, and you knew it was untrue?

A For the purposes of settling the case and obtaining a judgment for the full amount of the tax liability, which was due, I agreed to make a statement with respect to only the liens for which the assessment had been made."

The District Court disregarded the principles of law and the controlling decisions as stated in the following:

4 ALR Fed 537, page 539;

George S. Colton Elastic Web Co. v White
(1936, DC Mass) 16 F Supp 726;

George S. Colton Elastic Web Co. v White
(1938, DC Mass) 23 F Supp 761;

First Nat. Bank & T. Co. v Jones
(1945, DC Okla) 61 F Supp 364;

Commissioner v Chase Manhattan Bank
(1958, CA5 Tex) 259 F2d 231, cert den
359 US 913, 3 L Ed 2d 575, 79 S Ct 589;

III

Brast v Winding Gulf Colliery Co.
(1938, CA4 W Va) 94 F2d 179.

C) The District Court erred by not taking into consideration the ample evidence before it that the IRS violated the laws, regulations and procedures pertaining to the collection of taxes, liens and levies as follows:

- 1) That a jeopardy assessment was made against defendant-appellant under Section 6862 of 26 U.S.C.A. (I.R.C. 1954) without proper delegation of authority and in violation of administrative procedural and substantive due process.

The court disregarded the following controlling decisions on this point, which were submitted by defendant-appellant:

Thornton v U.S.A., in the U.S. District Court, East District, Pa., Civil Action 72-1259, 1/22/73, 1973 Standard Federal Tax Reports 80,422.

- 2) That the IRS failed to give the notices and demands required by the statute before a levy was authorized or liens filed. The court disregarded the weight of evidence in the record, proving these violations and disregarded the following controlling decisions on this point:

United States v Coson, 61-1 U.S.T.C. para. 9219 (9th Cir. 1962);

Bessie A. Mrizek and John R. Mrizek, v
H. Alan Long, District Director of In-
ternal Revenue for the Chicago Dis-
trict, Chicago, Illinois, 187 Federal
Supp. 830.

The above-cited controlling decisions empower the court to enjoin the collection of taxes and to declare the liens filed against defendant-appellant as void and illegal. Therefore, the plaintiff was not entitled to collect these taxes or interest and penalties charged on these taxes which constitute a great part of the said consent judgment.

D) The 'consent' judgment of February 6, 1976 states:

"THE COURT: What I would like now is to record again the condition set, that the Clerk enter judgment today against you, Miss Tassop, for \$275,000, subject to modification as to the amount by either side on an application within thirty days."

When the Court asked the defendant her reaction, the transcribed minutes show, on page 17, the following:

"THE COURT: Do you agree to that, Miss Tassop?

THE WITNESS: Do I?

MR. NEWMAN: That is what we agreed to.

THE WITNESS: I mean, as long as I can come back in thirty days and say, 'I am sorry, I think it is less'. "

As can be seen from the statement of accounts which was submitted to the court and constitutes Part V of this Memorandum, the defendant-appellant does not owe the plaintiff-respondent more than the sum of \$13,371.21.

- E) The defendant-appellant was deprived of her constitutional right to a fair trial. The defendant-appellant is being deprived of her property, an Academy with five hundred (500) students and forty (40) teachers, without due process of law.
- F) The plaintiff-respondent is barred from selling the school. St. Andrews Academy is operating under the authority of the Greek Orthodox Archdiocese of North and South America. The Greek Orthodox Church applied to be joined as a party but its application was refused by the court. The Greek Government has by law, on May 10, 1961, ordered that the St. Andrew School be accredited on the same standards as the public high schools of Greece as of September, 1960.

It would appear that Title 26, U.S. Code, Section 7852...(d) is a provision of law intended to honor the supremacy of treaty obligations to be applied in the administration of the Internal Revenue Code in the following language:

(d) Treaty obligations.--No provision of this title shall apply in any case where its application would be contrary to any treaty obligation of the United States in effect on the date of enactment of this title. Aug. 16, 1954, c. 736, 68A Stat. 922.

The inescapable result of granting plaintiff-respondent's motion to foreclose and sell the school buildings would be to destroy the school,

which result is contrary to the said treaties.

- G) The United States of America is a guarantor of schools operated under the direction of its recognized religious institutions. This has been established by the Treaty of Guadalupe Hidalgo of February 2, 1848. The Greek Orthodox school is entitled to the same status as a Catholic school.

Article 9 of the same Treaty states the following:

"The same most ample guaranty shall be enjoyed by all ecclesiastics and religious corporations or communities, as well in the discharge of the offices of their ministry, as in the enjoyment of their property of every kind, whether individual or corporate. This guaranty shall embrace all temples, houses and edifices dedicated to the Roman Catholic worship; as well as all property destined to its support, or to that of schools, hospitals and other foundations for charitable or beneficent purposes. No property of this nature shall be considered as having become the property of the American Government, or as subject to be, by it, disposed of or diverted to other uses."

The effect of this Treaty is to enjoin the United States Government, namely the plaintiff-respondent, from selling the property used by a religious school, which, in effect, will destroy the school.

BRIEF ON APPEAL OF DEFENDANTS - APPELLANTS
HELEN K. TASSOP AND TASSOP REALTY, INC.

PART I

STATEMENT OF FACTS

1. St. Andrew Academy was established in 1953. At present, it consists of:

- a. Two Nursery and Kindergarten Schools;
- b. One Elementary School;
- c. One Junior High School;
- d. One High School.

There are over 500 students and 40 teachers in the Academy.

2. St. Andrew Academy is the first and only Greek Orthodox High School in the western hemisphere. The curriculum goes beyond that prescribed by the New York City Board of Education and fulfills the requirements of the Board of Education of the Greek Orthodox Archdiocese and the Greek Ministry of Education.

The Academy is under the moral jurisdiction of the Greek Orthodox Archdiocese of North and South America.

3. On May 10, 1961, the Kingdom of Greece issued a royal order, No. 250, by Paul, King of the Hellenes, stating:

"The high school grades of the St. Andrew School of Greek American Culture be accredited on the same standards as those of the public high schools of Greece as of Sept. 1960."

In accordance with the treaty between the Government of the United States and the Government of Greece for financing educational exchange programs, signed on Sept. 13, 1963, the high school of St. Andrews' Academy qualifies for such an exchange program.

4. The defendant, Helen Tassop, and her mother ran the Academy more as a charitable institution rather than a money-making project. Several scholarships are granted to orphan children and children of poor families who are unable to pay the tuition. At present, there are fifteen students who were granted such scholarships. The Academy receives no subsidy

or financial assistance from any source. Nevertheless, the schools run by the Academy are among the best schools in the country, as testified to by important leaders of the community. Since 1963 the Academy's top graduates have won scholarships for Vassar College, Columbia University, New York University, Wells College, Hunter College, Barnard College and many other colleges and universities throughout the United States.

5. Since 1953, the defendant and her mother paid all taxes and kept current. However, due to financial burdens resulting from the illness and subsequent death of her mother, and the general economic situation, defendant, at the end of 1969, was unable to keep current.

In 1972, defendant approached the Flushing Office of the Internal Revenue Service through her attorney, Frank Mantzaris, for negotiating an arrangement to pay the due taxes. Her said attorney was negotiating with Revenue Officer Nespola. At that time defendant had no knowledge that her said attorney was being investigated by the Immigration authorities and the Criminal Division of the Department of Justice. He evidently neglected negotiations with the IRS and left the country. It seems that R.O. Nespola referred the matter to the Intelligence Division of the IRS. Defendant cooperated fully with the investigating agents and furnished them with all information regarding all personal and employment files, as well as checks and stubs.

Defendant understood through a statement by Special Agent Brown that she should cease her contacts with the Collection Division of the Internal Revenue Service, pending the finalization of the investigation. This led to the accumulation of unpaid several quarters for the year 1971.

6. Agent Marlow of the Intelligence Division of the IRS informed defendant early in 1972 that the investigation had been closed, and that she would hear from the Collection Division of the IRS.
7. In March, 1972, R.O. David Lapidus visited the Academy and told defendant he came to see her about a so-called open quarter, referring to the last quarter of 1967, alleging that there was a balance still unpaid. He made no reference whatsoever to the other quarters. However, defendant volunteered the fact that she owed withholding taxes for several quarters, denying, at the same time, that she owed any balance for 1967. Furthermore, defendant brought to the attention of R.O. Lapidus that there were credits still unconfirmed by the Government.
8. Since March, 1972, defendant started negotiations with mortgage banks and with financial companies to obtain a mortgage on the property used by the Academy in the sum of \$160,000.00 for the purpose of using part of this money to pay all IRS taxes owed up-to-date. A verbal commitment was obtained for the loan of \$160,000.00.

9. It took the defendant a few months to negotiate the details of the mortgage, because the bank and the financing companies wanted time to appraise the properties, but in August, 1972, defendant discovered that liens had been placed by the IRS on her properties on May 19, 1972. These liens were the cause of the collapse of negotiations for the mortgage.
10. Exhibit A, submitted by the plaintiff with the complaint, shows that the date of assessment and notice and demand for the 7 quarters, namely the 4th quarter of 1969, and the 1st, 2nd and 4th quarters of 1970, and the 1st, 2nd and 4th quarter of 1971, were made on the 16th of May, 1972. Exhibit B shows that the liens were filed on May 19, 1972. Although plaintiff claims that the date of assessment and notice and demand was May 16, defendant denies that she ever received any notice of assessments or any notice and demand. Moreover, liens were filed only three days after the date of the assessment.
11. In a similar manner, the IRS claimed, as it appears from Exhibit A, that the date of assessment for the first and second quarters of 1972, was the 2nd of August, 1972, and that the notice and demands were given on the 11th of August, 1972, while Exhibit B shows that the liens were filed on the 4th of August, 1972.

Defendant denies that she ever received the alleged notices and demands. The plaintiff did not submit any

evidence to show that the notices and demands were ever made or served on defendant.

12. In August, 1972, defendant went to the Hall of Records in Jamaica and discovered that the IRS filed further liens in May and August, 1972. Defendant contacted the IRS Office in Flushing, and inquired why they had filed these liens without giving her notice and demand. Both Mr. Lapidus and his supervisor, Mr. Scotti, told defendant, "It is true that we've placed these liens," and gave no other explanation.
13. Due to the filing of these liens in May and August, 1972, all defendant's efforts to obtain a loan and a mortgage on the property failed. During 1973, 1974 and 1975, defendant visited the Internal Revenue Offices in Flushing, Brooklyn and Federal Plaza more than 25 times, and met the following persons: Mr. Monaghan, Group Manager of Flushing; Mr. Copperwill, Revenue Officer; Mr. Rothstein, Revenue Officer; Mr. Snowdown, Revenue Officer; Mr. Hecht, Revenue Officer; Mr. Gill, Field Manager; Mr. Gargano, Field Supervisor; Mr. Marcades, Special Procedures; Mr. Keenan, Chief, Collection; Mr. Gordon, Assistant to the District Director; Mr. Ziegler, Regional Counsel; Mr. Coleman, Assistant to the Regional Commissioner. Defendant asked each of these officers whether the liens were filed by the IRS on her properties in accordance with the law. They all stated that the liens were filed correctly and could not be removed. Defendant

protested to them that she had never received any notice and demand from them, and therefore these liens were filed incorrectly, and pleaded with them to remove the liens to enable her to raise money by a mortgage to pay all that is due from her to the Government.

14. Defendant went again to Mr. Monaghan and requested him to assist her by subordinating the liens placed by the Government to a first mortgage so that she could obtain a loan in the amount of \$135,000, but he refused.
15. Defendant learned in June, 1975 that the IRS was trying to sell her properties in California, consisting of four houses and one vacant lot in Los Angeles, California, which were subjected to the liens illegally filed in 1972. Defendant pleaded with the IRS not to proceed with the sale, and to lift the liens to enable her either to mortgage or sell the property, but they refused to do so, and consequently they sold these properties, consisting of four houses and an empty lot, which were worth \$80,000 for \$9,676.00.
16. Defendant went to see Mr. Gordon, the Assistant to the District Director, and Mr. Keenan, Chief, Collection Division, to obtain an answer to her question: why were the liens illegally filed? Mr. Gordon told her that he had personally contacted and conducted an in-depth investigation with R.O. David Lapidus, and that he found out that the procedure was properly followed and the

Government's position was sound. Defendant insisted on seeing copies of Form 3552, namely, the notices and demands, which they claimed to have sent to her, and copies of delegation orders for making prompt assessments, which are also supposed to be in the files of the District Director's office. Mr. Keenan and Mr. Gordon told defendant: "We have nothing in our files." Defendant asked them if they would put that in writing. There was an exchange of glances between Mr. Gordon and Mr. Keenan, and it appeared that Mr. Gordon at that moment did not want Mr. Keenan to put something like that in writing. Nevertheless, Mr. Keenan took defendant to his office and gave her a letter dated June 10, 1975, stating:

Dear Miss Tassop:

On today's date you requested certain information from me regarding your tax liabilities for several periods in 1969 and 1970. Specifically you requested our file copy of Form 3552 and a copy of a Director's delegation order providing the group manager with the authority to make a prompt assessment against you. This is to advise you that I do not have these records.

17. On July 3, 1975, defendant wrote a letter to the District Director of the IRS, Mr. Brennan, requesting the following information: copies of the notices and demands on the basis of which the liens were filed; the delegation or redelegation orders recommending prompt assessment; the reason why the 10 days were cut short and defendant was considered a jeopardy case.

The District Director refused to furnish defendant with a reply. Defendant went to the Regional Commissioner's Office with a copy of the said letter, and met Mr. Coleman, who showed great interest in the contents of the letter and assured defendant that a reply would be sent to her. When no letters came and defendant inquired again, defendant was told that Mr. Coleman took a vacation, but a reply would be sent soon. Upon further demands for a reply from the District Director's Office, defendant was informed by the Office of Special Procedures that the whole matter was referred to the Justice Department and, according to procedure, they are not supposed to communicate with defendant any further on this matter.

18. Defendant contacted Mr. Fuerth of the Tax Division of the Department of Justice in Washington, D.C., and told him that the IRS Regional Director informed defendant that they had sent the file to him. Defendant requested whether they are going to answer her letter of July 3, and why would the Government sell her properties in California? His first reaction was: Why don't you pay the taxes? Defendant told him that in order to pay the taxes, she has to obtain a loan, and this cannot be done unless the illegal liens are removed. Mr. Fuerth told defendant the file of the Regional Office had not yet arrived. Defendant was led to believe that a reply would be forthcoming, which defendant has never received.

19. In August, 1975, defendant appointed a new attorney, Mr. Brotman, to negotiate a settlement with the Justice Department. He contacted the Regional Office of the IRS and Mr. Brian Ferrel of the Justice Department in Washington, D.C., to discuss a settlement and to lift all liens to enable her to raise some money to pay the taxes due to the Government. Instead of making any settlement, the Government filed the complaint and issued the summons on the 9th of September, 1975.

PART II

RELIEF FROM JUDGMENT ENTERED 7 FEBRUARY, 1976

AND FROM THE STIPULATION DATED

FEBRUARY 6, 1976

1. Defendant is entitled to a relief from the judgment of this Court entered on the 7th of February, 1976, under Rules 59 and 60 of the Rules of Civil Procedure for the United States District Courts.

On February 6, defendant went with her attorney to the Courthouse for the hearing on the motion for contempt. Defendant's attorney gave the attorney of the Government in front of the judge a check for \$13,000. The defendant was put on the stand and swore that the money was in the bank, and therefore the judge did not make any order for contempt.

On that day, February 6, defendant's attorney was supposed to continue with the depositions, and the witness was Mr. Herman Marcades of Special Procedures. After the parties left the Court, attorney of defendant told her, "Let us go to the judge's chamber, because we are going to have a settlement." The defendant was led to believe by the statement of her attorney that a compromise and a settlement would be made.

On the contrary, no real account of the amounts defendant owed was made, and no real settlement was ever made, but

a round figure was suggested, which does not represent the taxes due from defendant.

Therefore, the defendant hereby applies for relief from the said judgment on the ground of mistake, inadvertence, excusable neglect, and intrinsic and extrinsic misrepresentation by her attorney/ and by the attorney of the plaintiff.

Moreover, the said judgment of February 6 was not a final judgment, but subject to a review and adjustment, and therefore defendant is entitled to relief under Rule 60 of the Rules of Civil Procedure for the United States District Courts.

2. Defendant is entitled to a relief from the stipulation made on the 6th of February, 1976 in the judge's chamber, on which the abovementioned judgment of this Court, entered on February 7, 1976, was based.

Defendant submits that the whole procedure on the said date was irregular.

It is submitted that the transcribed minutes of the meeting in the judge's chamber on February 6 does not represent what happened because there were mistakes made by the shorthand typist. For instance, on page 5 of the said transcript appears an alleged statement by the defendant, who was the witness, as follows:

"THE WITNESS: The terms of the proposed settlement will be that the defendant, Helen Tassop, will admit and confess judgment for all."

It is impossible that this statement could be the statement of the defendant.

The dialogue which took place between attorney of the plaintiff and the attorney of the defendant in the chamber was not fully understood by the defendant. Her attorney gave her the impression that the Government would really accept a compromise and permit her to mortgage the property in order to pay the taxes which would be agreed as a result of the compromise and the settlement. The defendant on page 8 of the said transcript stated:

"THE WITNESS: But I do have a chance to mortgage the property and raise money to pay the Government which I originally wanted in 1972?"

From the discussion regarding the method of the defendant keeping current, she was under the impression that the Government would accept an arrangement for the payment of the taxes, and was pleased to hear Mr. Ferrel, counsel for the plaintiff, state:

"The only thing I can offer in connection with that which I have offered to some of the other attorneys representing you in this case, I would like you to attempt to get some sort of systematic payroll system established at the school and attempt to do this on a fairly regular basis. That might be of some help to you.

THE WITNESS: All right."

(See pages 10, 11 of the transcript)

When discussion was about allowing the defendant to

mortgage the property and make some payment to the Government, the transcribed minutes show the following:

"THE COURT: How much will that leave for the Government?

MR. NEWMAN: It will leave approximately between thirty-eight and forty thousand dollars.

MR. FERREL: You offer that?

MR. NEWMAN: And the balance will be used towards the payment of your tax liability. It has to be. That cannot be used for operating capital.

THE WITNESS: I was --

THE COURT: You are drowning out.

THE WITNESS: There was no reason to drown out, Your Honor. If I was given this opportunity in 1972. I had the money in 1972."

The defendant did not follow closely the discussion between her attorney and the attorney of the plaintiff and the Court, and she was later told by the Court that the Government wanted a judgment at that day. The transcribed minutes of the meeting, on page 16, shows the following:

"THE COURT: Miss Tassop, what I understand Mr. Ferrel has said, is that he will press the case unless he has a judgment entered today for the amount which I understand you have been permitted to. I suggest the figure of \$275,000, which is a little less than the complainant asked, and will be subject to an adjustment in thirty days by motion by either side. Are you willing to do that?"

The defendant felt, at that time, she was under duress by the Government.

The Court stated on pages 16-17 of the transcribed minutes, the following:

"THE COURT: What I would like now is to record again the condition set, that the Clerk enter judgment today against you, Miss Tassop, for \$275,000, subject to modification as to the amount by either side on an application within thirty days."

When the Court asked the defendant her reaction, the transcribed minutes show, on page 17, the following:

"THE COURT: Do you agree to that, Miss Tassop?

THE WITNESS: Do I?

MR. NEWMAN: That is what we agreed to.

THE WITNESS: I mean, as long as I can come back in thirty days and say, 'I am sorry, I think it is less'."

Another proof that the defendant acted under mistake, inadvertence and misunderstanding and misrepresentation, was the fact that she requested her attorney to submit a motion to set aside the said judgment entered on February 7, 1976.

In Paragraph 11 of the Affidavit submitted by Mr. Peter R. Newman in support of his motion for leave to withdraw as counsel for Defendant, he stated:

"11. Miss Tassop has requested that your affiant move to have the consent judgment entered into on February 6, 1976, set aside upon the grounds that when she entered into said consent judgment, she really did not know the force and effect of said consent judgment."

3. The law regarding the right of the taxpayer to be relieved of the effect of the provisions of a stipulation is summed up in 4 ALR Fed 537, page 539, as follows:

"The right of a taxpayer who is involved in a dispute with the Federal Government concerning tax liability, to be relieved of the effect of the provisions of a stipulation made by the taxpayer in connection with such a dispute, is governed by the same rules as apply to the granting of relief from stipulations generally. Thus, the rule that the trial judge has discretion to grant a party relief from a stipulation which he has entered into in the course of judicial proceedings, where the stipulation was made improvidently, inadvertently, mistakenly, or as a result of fraudulent inducements, has been applied or recognized in cases where a federal taxpayer sought such relief. Similarly, the statement that relief from a stipulation will only be granted where such relief will not be likely to result in serious injury to one of the parties, has also been recognized in cases dealing with the right of a taxpayer to such relief.

With reference to the particular cases in which relief from a stipulation has been sought by a federal taxpayer, no general rule can be formulated regarding the requirements regarded by the courts as essential for the granting of such relief, and the cases are decided upon their individual facts, of which the presence of any estoppel on the part of the taxpayer, and the nature of the stipulation and the relief sought, as well as the stage of litigation at which such relief is sought, are particularly emphasized. Thus, courts have granted relief to a taxpayer from a stipulation entered into with the government under a mistake of law, both in the same proceeding as that in which the stipulation was entered into, and also in subsequent proceedings. Similarly, the courts have both granted and denied relief from a stipulation of fact where such relief was sought either in the same proceeding as that in which the stipulation was entered into, or in a subsequent proceeding."

The following are the leading cases supporting the right of defendant to relief from the said stipulation:

- "a. George S. Colton Elastic Web Co. v White
(1936, DC Mass) 16 F Supp 726;

The Court stated that a stipulation made by the taxpayer before the Board of Tax Appeals,

should not be permitted to preclude him from bringing an action to recover taxes improperly collected under the stipulations, the court noting that it is unreasonable to suppose that a stipulation in the course of proceedings before the Board of Tax Appeals was intended by the parties thereto as a final determination of all possible questions of tax liability.

- "b. George S. Colton Elastic Web Co. v White
(1938, DC Mass) 23 F Supp 761;

The Court, in permitting a taxpayer to recover amounts paid under a stipulation made with the Commissioner which erroneously omitted a deduction available to the taxpayer, stated that an account settled may be impeached for a mistake of fact or of law, and concludes nothing as to items not embraced within the stipulation, from which relief will be granted in the absence of any estoppel.

- "c. First Nat. Bank & T. Co. v Jones
(1945, DC Okla) 61 F Supp 364;

The court stated that where there is an error in a stipulation, based upon misinformation at the time of making the stipulation, the court not only has the power to, but should, correct the mistake, in the exercise of its inherent power to grant relief therefrom when made improvidently or when enforcement thereof would work injustice.

- "d. Commissioner v Chase Manhattan Bank
(1958, CA5 Tex) 259 F2d 231, cert den
359 US 913, 3 L Ed 2d 575, 79 S Ct 589;

The court refused to hold a taxpayer to facts apparently stipulated in the trial court, stating that a misapprehension of the effect of certain facts in law should not be permitted to result in an erroneous decision, nor to prevent argument of that issue on appeal.

- "e. Brast v Winding Gulf Colliery Co.
(1938, CA4 W Va) 94 F2d 179;

The court stated that a taxpayer which has entered into a stipulation with the Commissioner of Internal Revenue computing taxes for certain years has the unquestioned right, where the stipulation was entered into under a mistake of law, to ask that it be relieved of the stipulation upon the discovery of the mistake, and therefore the

court affirmed the action of the trial court in relieving the taxpayer of a stipulation, where a decision of the Board of Tax Appeals upon which the stipulation entered into by the taxpayer had been based, and under which the taxpayer had agreed to pay a contested amount of taxes, was subsequently reversed by the Circuit Court of Appeals, and the taxpayer brought this action to recover the excess taxes paid. The court stated that regardless of the facts that a final order of redetermination had been entered into by the Board of Tax Appeals in accordance with the stipulation in the prior proceeding, and that no appeal had been taken by the taxpayer from this order, the taxpayer had not entered into a compromise and settlement by virtue of making the stipulation in question, but had merely agreed to pay what it was not, under the law as finally determined, required to pay as taxes. The court noted that the government had suffered no prejudice by reason of the relief granted the taxpayer, but had merely been required to refund a sum which it had had no right to collect."

Relief is also hereby sought from the judgment of this Court entered on May 7, 1976, because it was based on the judgment of February 9, 1976 and the stipulation entered into on February 6, 1976.

PART III
VIOLATION BY THE IRS OF THE LAWS,
REGULATIONS AND PROCEDURES PERTAINING
TO COLLECTION OF TAXES AND LIENS

The facts of this case prove that the IRS violated all the laws, regulations and procedures pertaining to the collection of taxes, liens and levies, thereby burdening the defendant with unjustifiable assessments and imposing unusual hardships in exceptional circumstances, which prevented defendant from raising any money by obtaining loans to pay the taxes due to the plaintiff. The IRS illegally seized defendant's properties in California, which were worth \$80,000, and used illegal liens and levies to foreclose and sell the said properties for \$9,676.00, without due process of the law and in violation of the Fifth Amendment.

The following are the violations which were committed by the IRS:

1. R.O. David B. Lapidus made a prompt assessment against defendant without proper delegation of authority;
2. The IRS failed to give the notice and demand required by the statute before a levy was authorized or liens filed.

1. R.O. DAVID B. LAPIDUS MADE A PROMPT ASSESSMENT AGAINST
DEFENDANT WITHOUT PROPER DELEGATION OF AUTHORITY

Sections 6202 and 6203 of 26 U.S.C.A. (I.R.C. 1954)

provide for the making of tax assessments in very general terms. The assessment procedure is detailed in the Internal Revenue Service Manual.

Section 5213.52 of the IRS Manual states:

"CRITERIA FOR RECOMMENDING PROMPT ASSESSMENTS

(1) The necessity for prompt assessments should be rare and should only arise in instances where collection of the tax appears to be in jeopardy at the time the delinquent return is secured, and when there is every intention of proceeding with enforcement action immediately upon receipt of the assessment.

(2) Prompt assessments allowing collection action to be taken without regard to the ten-day notice period should be limited to the following situations, and will be based upon the facts and circumstances of each individual case.

(a) Taxpayers who are consistently suffering financial losses;

(b) Taxpayers against whom large damage suits are pending, or against whom such suits are threatened;

(c) Taxpayers who have a past record of resisting or avoiding payment of their taxes;

(d) Taxpayers suspected of having plans for leaving the United States without making provision for payment of their taxes, with particular attention being given to aliens;

(e) Other taxpayers, where the facts and circumstances indicate that the taxpayer's present financial condition, or further possibilities, are such as to make collection of the tax doubtful.

(3) Since the initial decision as to whether or not collection of a tax is in jeopardy must be made by the person handling the case, it is necessary that proper authority be delegated to him. District Directors should consider issuing

redelegation orders authorizing Revenue Officers GS-9 and above to enforce collection without regard to the ten-day notice period on any case where it is determined that collection of the tax may be in jeopardy.

(4) If the initial investigation indicates that collection may be in jeopardy and the investigation employee does not have delegated authority, he should discuss the case with someone who has been delegated the authority in (3) above, and a decision should be made as to the course of action to be taken.

(5) The case history file should be fully documented to reflect the facts and circumstances that support the determination that collection is in jeopardy, e.g., financial statement, financial analysis, narratives of conversations with other creditors of the taxpayer, data on previous case histories, or other relevant factors. In addition, the Revenue Officer should include a list of leviable assets upon which enforcement action may be taken when assessment is received.

Section 5213.54 of the I.R.C. states:

"TELEPHONE REQUEST FOR PROMPT ASSESSMENTS

(1) Service centers will process prompt assessments on a daily basis. When circumstances require more expeditious assessment than can be achieved through written prompt assessment procedure, telephone request for prompt assessment may be made to the service center. Telephonic requests may be made by Collection activity managers, including Office Branch Supervisors and Group Managers who have been delegated authority to determine that collection is in jeopardy. The requests should be limited to cases requiring immediate lien or seizure action to protect the interests of the Government. Such an instance would be advice of a taxpayer's intention to file petition in bankruptcy or dispose of assets within 48 hours.

(2) The telephonic request should be made to the service center Accounting Branch and will include the following information:

(a) Name, address and identification number of taxpayer;

- (b) Type of tax;
- (c) Taxable period;
- (d) Amount of tax, penalty and interest to be assessed;
- (e) Amount of payment, if any, and balance due;
- (f) Revenue Officer TDA/TDI Assignment Code.

(3) Upon receipt of the telephone request, the service center Accounting Branch will assign a Document Location Number (DLN), journalize, prepare a separate Form 23-C, and notify the Group Manager by telephone of the appropriate DLN and Form 23-C date. The service center will then prepare Form 3552, Prompt Assessment Billing Assembly, mark Part 5 "Per Telephone Request" and send it with Parts 3 and 4 on the same date to the Group Manager, or directly to a Revenue Officer if so requested.

(4) After the Group Manager has been notified as to the appropriate DLN and Form 23-C date, he will ascertain that Form 2859, confirming the telephone request, is prepared promptly. Form 2859 will be prepared in triplicate and noted "Telephone Request." The original and duplicate of Form 2859 with related tax return will be sent to the service center Accounting Branch. The triplicate copy of Form 2859 will be retained pending receipt of Form 3552."

The record of the case shows that R.O. David B. Lapidus violated Rule 5213.52 and Rule 5213.54 of the IRS Manual, by making the prompt assessment against the defendant.

There was no proof that the District Director issued redelegation orders authorizing R.O. Lapidus to enforce collection without regard to the ten-day notice period, which is necessary in any case where it is not determined in accordance with the rules that the collection of the tax may be in jeopardy.

In fact, there was no determination in accordance with the rules that the collection of the tax from the defendant was in jeopardy, and even if such determination was made, it would have been illegal, arbitrary and capricious because collection of taxes from defendant in the circumstances of this case does not fall within the cases enumerated in Section 5213.52 of the IRS Manual.

The deposition of R.O. David B. Lapidus was taken on January 22, 1976 and February 5, 1976. Mr. Lapidus did not remember who was his supervisor who gave him authority to make prompt assessment. On pages 3 and 4 of his deposition on February 5, 1976, he stated:

"A. Well, we had several supervisors at that time. I can't really recollect. We had a change of supervisors at one point. We had, at one time, Arnold Silversmith, and a Mr. Pagano. I don't recall exact dates when one left and when one started. I know Mr. Pagano was there for a short while and he was Acting Supervisor. We had a supervisor from a joint group that was taking care of our group when needed in that capacity."

Mr. Lapidus was not certain who was his actual supervisor, and this proves that there was no such authorization. Counsel for the plaintiff, Mr. Ferrel, came to his assistance and supplied the information. Mr. Ferrel stated, on page 5 of the deposition, as follows:

"MR. FERREL: Mr. Pagano was the group supervisor for Mr. Lapidus on May 16, 1972 in connection with the apparent assessment."

When Mr. Lapidus was pressed to remember who authorized him to serve defendant with what he called "an interim form" he stated on page 32 of the deposition, the following:

"A. I don't recall which supervisor it was. I don't recall."

On pages 16-17 of the deposition, Mr. Lapidus testified that he made a telephone call to the Andover Service Center and read from an entry on the history sheet the following:

"A. Call made to Andover Service Center, Accounting Branch, via FT. Spoke to Mrs. Vallieres, who supplied DLN assessment date. Copy of 941s attached. D. Lapidus. Prompt assessments are in effect for taxpayer periods, last quarter 1969, first quarter 1970, second quarter 1970, fourth quarter, 1970, first quarter 1971, second quarter 1971, fourth quarter 1971. D. Lapidus."

When Mr. Lapidus was asked what were the bases on which he made the prompt assessment, he stated, on pages 17-19, the following:

"A. Not totally, no, sir. It was -- to the best of my recollection, this was done after a discussion with the supervisor at that time. All of the handling of a subject, such a prompt assessment would call not only for a discussion, but the authority and the supervisor's approving of that and that is required to speak to Andover and have Andover do this work.

Q. You did make the call, though?

A. The physical call of dialing on the phone?

Q. Yes.

A. I believe so.

Q. Do you recall the substance of the conversation you had with your supervisor regarding the prompt assessment?

A. Just give me time to think on your question a minute. The substance of the conversation?

Q. Yes.

A. That preceded this call?

Q. That preceded the call.

A. Well, we had a discussion. The facts regarding the case were shown to the supervisor. After the supervisor saw the information in the case folder, there was a discussion about the various attempts to get information and collection.

After a discussion of the case with the supervisor on that date, a decision was reached. The supervisor advised me that the proper thing to do would be to call in for a prompt assessment.

Q. Do you recall what the basis of this decision was, what facts?

A. The basis of the decision?

Q. What facts were discussed?

A. Well, we had the returns in our possession. Returns were filed for that money. We knew the taxpayer had financial problems. We could not get too much financial information from the taxpayer. To properly protect the Government's interest and priority, it was felt that a prompt assessment should be done at this time."

These statements of R.O. Lapidus proved beyond any shadow of doubt that he did not comply with Rules 5213.52 and 5213.54 of the IRS Manual. Mr. Lapidus never had the proper authority delegated to him or the redelegation orders authorizing him to enforce collection without regard to the ten-day notice.

The letter of Mr. Keenan, Chief, Collection Division, to the defendant of June 10, 1975, proves that no such authority was given. The letter states: "Specifically, you requested our file copy of Form 3552, and a copy of a Director's delegation order providing the Group Manager with authority to make a prompt assessment against you. This is to advise you that I do not have these records."

These facts prove there was no legal authority to make the prompt assessment against the defendant, and therefore the assessment was made illegally in contravention of the statute. Furthermore, the facts of this case do not call for invoking the drastic measure of prompt assessment, which should be used rarely and only in exceptional circumstances. There was no proof that R.O. Lapidus was authorized by the District Director to make the prompt assessment.

These facts are exactly the same in the case of Thornton v U.S.A., in the U.S. District Court, East District, Pa., Civil Action 72-1259, 1/22/73, 1973 Standard Federal Tax Reports 80,422.

In giving the order, District Court Judge Davis stated:

"DAVIS, District Judge: The Court is presented with a number of motions by the plaintiffs in this case which involves jeopardy assessments provided for under Section 6861 of the Internal Revenue Code of 1954 (26 U.S.C. Section 6861). In essence the plaintiffs are asking for a permanent injunction to enjoin the collection of the jeopardy assessment as well as a declaratory judgment to determine the taxpayer's liability with respect to the federal taxes due.

Plaintiff, Henry Thornton, is the owner of the stock of two liquor serving restaurant establishments located in Philadelphia and operating as Mickey's Bar Inc. and New Checkers Cafe, Inc. Both of these establishments have liquor licenses as prescribed by the rules and regulations of the Pennsylvania Liquor Control Board.

On June 21, 1972 the District Director of the Internal Revenue Service made jeopardy assessments of \$17,904.54 against plaintiffs, Henry and Ernestine Thornton, for the calendar years 1967, 1968, 1969 and 1970. Also on June 22, 1972, jeopardy assessments of \$50,192.45 were made against "New Checkers Cafe, Inc." and \$49,457.73 against Mickey's Bar Inc.

The plaintiffs contend that the assessments were illegal because they were not personally made by the District Director of the Internal Revenue, Alfred L. Whinston, who was away on leave at the time the jeopardy assessment was authorized. The assessment was authorized by a group chief rather than by the District Director himself.

The Statute (26 U.S.C. 6861) states the following: (emphasis added)

If the Secretary or his delegate believes that the assessment or collection of a deficiency will be jeopardized by delay . . . he shall . . . immediately assess such deficiency . . . and notice and demand shall be made by the Secretary or his delegate for the payment thereof.

The question then arises as to who is the delegate of the Secretary of the Treasury and who can authorize jeopardy assessments. As far as this Court can determine, this question has not arisen in case law. However, Treasury regulations and procedure bulletins cover this point as well as Merten's Law of Federal Income Taxation.

Treasury Regulation 301 Section 6861-1 covers the same language as in the statute. Revenue Procedures 60-4-1960, 1 C.B. 877 states: (emphasis added)

"Recommendations for jeopardy assessments other than of alcohol or tobacco taxes, must be personally approved by the District Director of Internal Revenue."

Nowhere in the procedure, regulations or statutory law is there any interpretation that allows the delegate to delegate his power to authorize a jeopardy assessment. The power to authorize this assessment is left in the hands of the delegate who alone must exercise his authority. Merten's Law of Federal Income Taxation, Vol. 9, Par. 49, 144, p. 272 states:

Recommendations for jeopardy assessments must be personally approved by the District Director.

The above citations leave little doubt that the jeopardy assessment must be personally approved by the District Director.

This Court does not look favorably upon improper procedure in a situation where a taxpayer's money is first taken by the Government and litigation occurs

after the taxpayer is deprived of his property. Strict procedure must be followed where property is taken before the taxpayer has an opportunity to litigate his case. In Darnell v. Tomlinson [55-1 USTC ¶ 9337] 220 F. 2d 894, (5th Cir. 1955) the Court said regarding jeopardy's assessments:

Nothing here said is intended to limit the exercise by the director of his legal discretion, but it is intended to indicate to both taxpayer and director alike that the jeopardy assessment procedure is an exception to the normally accepted method of assessment and collection of taxes; . . . and further that if improvidently used, there is now an opportunity for the director to right the wrong.

In the case at bar, there was no legal discretion by the delegate of the Director of Internal Revenue because he was away on leave and never saw the jeopardy assessment before it was issued. Clearly this is error.

The Government did not counter the argument that the assessment was made illegally, either in their brief or in the hearing that was conducted by this Court. There was not even an attempt to show that the authorization for the assessment was given by the Acting District Director. Based upon the facts presented, this Court will permit an injunction preventing a jeopardy assessment by the United States Government.

2. THE IRS FAILED TO GIVE THE NOTICES AND DEMANDS REQUIRED BY THE STATUTE BEFORE A LEVY WAS AUTHORIZED OR LIENS FILED

A levy is an administrative means of collecting taxes by seizure of property which may be subjected to appropriation to satisfy delinquent taxes. It has been characterized as a summary administrative remedy available to the Government to enforce collection of taxes.

The authority to levy upon or seize property to effect collection of delinquent taxes is contained

in the IRC, § 6331 (26 U.S.C. 6331). The exercise of this authority is one of the strongest means available to collect a tax and, therefore, there must be full compliance with the conditions set forth by Congress in the said IRC 6331.

The said § 6331 states:

"(a) Authority of Secretary or delegate.

If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary or his delegate to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under § 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer (as defined in § 3401(d) of such officer, employee, or elected official. If the Secretary or his delegate makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary or his delegate and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section."

The plaintiff alleges in Exhibit A, submitted with the complaint, that the IRS made assessment against the taxpayer-defendant for unpaid Federal Withholding Taxes (WH), Federal Insurance Contribution Taxes (FICA), and Federal Unemployment Taxes (FUTA) for the fourth quarter of 1969, the first, second and fourth quarters of 1970, and the first,

second and fourth quarters of 1971 on May 16, 1972. The same Exhibit states that the assessment for the same taxes for the first and second quarters of 1972 was made on the 2nd of August, 1972.

Exhibit B, submitted with the complaint, shows that the IRS filed liens against defendant's property on the 19th of May, with respect to the assessment for the aforementioned seven quarters, and filed liens on the 2nd of August, 1972, with respect to the last two aforementioned quarters of 1972.

According to the statement of R.O. Lapidus on pages 55-56, he claims that he gave Miss Tassop an interim notice and demand on the 18th of May, 1972. The following is a quotation from the abovementioned pages of his deposition:

"Q. With respect to the assessment on May 16, 1972, is it correct that in your direct examination you testified that you gave Miss Tassop an interim notice and demand?

A. Not on the 16th.

Q. What was the date?

A. I believe it was on the 18th."

This statement was contradicted by the deposition of Fred Hecht of the IRS Collection Division, taken on February 5, 1976, page 12. The following is a quotation from the said deposition:

"Q. Mr. Hecht, were you present during Mr. Lapidus' deposition?

A. Yes.

Q. Did you hear any reference to interim notice and demand?

A. Yes. He said he made one out and gave it to her.

Q. Have you searched the case file with respect to the Tassop matter to determine if you could find the interim notice and demand?

A. Yes. It was my case. I looked through every piece of paper I had.

Q. Were you able to find it?

A. No."

In the deposition of Raymond Keenan, Chief of the Collection Division of the Brooklyn District, taken on the 22nd of January, 1976, he was asked, on page 31, the following:

"Q. At the time, if a notice and demand is made, if you know, would it be normal procedure for a copy of the notice and demand to be maintained?

A. Yes.

Q. In your review of the file, that you previously testified to, do you recall seeing a copy of a notice and demand that was given to Mrs. Tassop?

A. No."

The plaintiff did not submit any evidence to prove that the notice and demand were given in accordance with the law.

In spite of the failure of the IRS to give defendant the statutory notice and demand, they proceeded in the sale of the defendant's property in California, and illegally sold three houses and one lot of land, of the value of \$80,000, for about \$9,676.00.

In addition, they filed liens on defendant's properties on May 19, 1972 and August 4, 1972, within two or three

days from the alleged date of assessments, stated in Exhibit A, and thereby deprived defendant of the possibility of arranging loans to pay the delinquent taxes.

Section 6321 of the IRC provides that a lien will arise only after demand. The lien is deemed to relate back to the assessment date after demand and neglect or refusal to pay. However, it is important that a demand be made or be waived, or there can be no lien (Internal Revenue Manual, February 10, 1975, par. 221).

Notice and demand is not only required for the creation of a lien, but it also begins the time period for collection by administrative action. If a taxpayer fails to pay within 10 days of notice and demand, § 6331 of the Internal Revenue Code authorizes the use of levy and distraint by the Secretary or his delegate to collect the tax.

Defendant submits the following controlling decisions relating to the violation by the IRS of the laws, regulations and procedures relating to the collection of taxes and liens which entitle defendant to relief:

1. United States v Pavenick, 107 F. Supp. 257 (1961)

The following points were decided by the court in the abovementioned case:

(a) Upon proof of demand, lien for unpaid federal unemployment and withholding taxes arises at time of assessment thereof by collector. 26 U.S.C.A. (I.R.C. 1939) Sections 3670, 3671.

(b) Demand for payment of amounts assessed

against taxpayer for unpaid federal unemployment and withholding taxes, penalties and interest was necessary to establish lien therefor. 26 U.S.C.A. (I.R.C. 1939), §§3670, 3671.

(c) Affidavit that records of office of District Director of Internal Revenue disclosed that first notice and demand for payment had been mailed to taxpayer against whom federal unemployment and withholding taxes for previous years had been assessed was insufficient to establish demand for payment as basis for tax lien, in absence of presentation of such records or copies thereof. 26 U.S.C.A. (I.R.C. 1939) §§3670, 3672; 28 U.S.C.A. §1733.

2. United States v Coson, 61-1 U.S.T.C. ¶9219 (9th Cir. 1962)

A Federal tax lien was adjudged null and void in a suit to quiet title because no demand was made against the owner of the property. In this case demand was made upon a partnership for payment of a tax liability. Under general principles of partnership law, notice and demand to one partner is notice and demand to all; however, under principles not here relevant, Coson was held not to have been a partner and therefore did not receive effective demand for payment.

3. Bessie A. Mrizek and John R. Mrizek, v H. Alan Long, District Director of Internal Revenue for the Chicago District, Chicago, Illinois, 187 Federal Supp. 830

This was an action by individuals against the District Director of Internal Revenue for relief from action of

Director in seizing property of corporation, of which individuals were officers, assessing penalties, and recording liens therefore against individuals' property. The court delivered an important judgment which is the leading case on this subject. On page 835, the court stated:

"(a) Section 6331(a) requires a notice and demand before the Secretary of the Treasury or his delegate may collect a tax, from any person liable to pay it, by way of levy upon property and rights thereto. Plaintiffs aver that there has been no such notice and demand. Assuming this averment to be true, the Court cannot approve a plain disregard of congressional mandate. Still assuming the averment to be true, the Court can conceive of no theory which would warrant the defendant's failure to comply with this statutory requirement. A notice of seizure, prepared five days after the levy as alleged by plaintiffs, does not satisfy the requirement.

"(b) A levy is authorized only when a taxpayer 'neglects or refuses' (after 10-day notice and demand), or upon 'failure or refusal' (after jeopardy finding, notice and demand), to pay any tax for which he is liable. The amended complaint sufficiently alleges that the R. J. Mrizek Co., Inc. has never neglected, failed or refused to pay any tax liability, both because it was making payments pursuant to an agreement with defendant until defendant by his own actions cut off the means of payment, and because no neglect, failure or refusal to pay within the meaning of §6331 can occur prior to notice and demand.

"(c) Plaintiffs' allegation that defendant's levy on the property of the R. J. Mrizek Co., Inc. has deprived them of their property, is unchallenged in defendant's motion to dismiss and supporting briefs. The Court holds that if plaintiffs are being thus deprived of their property by administrative action purporting to conform, but failing to conform, to the requirements of §6331, the plaintiffs have sufficiently alleged deprivation of property without due process of law in violation of the Fifth Amendment.

"§ 6672. Plaintiffs do not allege that they are not required by law 'to collect, truthfully account for, and pay over any tax imposed by this title' and the Court assumes that they are so required.

"§ 6671(a) reads:

(a) Penalty assessed as tax.--The penalties and liabilities provided by this subchapter shall be paid upon notice and demand by the Secretary or his delegate, and shall be assessed and collected in the same manner as taxes. Except as otherwise provided, any reference in this title to 'tax' imposed by this title shall be deemed also to refer to the penalties and liabilities provided by this subchapter.

"The amended complaint avers that the 'notice and demand' specified in § 6671(a) has never been given or made upon them. A notice of proposed assessment of the penalty prescribed by § 6672 does not dispense with the necessity for the notice and demand prescribed by § 6671(a) and referred to as forthcoming in the notice of proposed assessment. Assuming the averment to be true, the Court is obliged to conclude that this requirement of the statute has been disregarded by the defendant."

On page 837, the Court stated:

"The crux question is whether § 7421(a) prohibits this Court from granting equitable relief from defendant's alleged illegal actions.

"Notwithstanding the apparent breadth of the statutory withdrawal of jurisdiction in § 7421(a), the courts have been presented with a number of situations to which the section does not apply. One District Judge, in Communist Party U.S.A. v Moysey, 141 Fed. Supp. 332 (S.D.N.Y., 1956) [56-2 USTC ¶ 9625], has attempted to categorize these situations (at 338):

"(a) Suits to enjoin collection of taxes which are not due from the plaintiff but, in fact, are due from others. For example, Raffaele v Granger, 3 Cir., 1952, 196 Fed.2d 620, 622 [52-1 USTC ¶ 9321], in which the Court enjoined the distraint against a bank account in the joint names of husband and wife 'as tenants by the entireties' when the tax was due solely from the husband.

"(b) Cases in which plaintiff definitely showed that the taxes sought to be collected were 'probably' not validly due. For example, Midwest Haulers, Inc. v Brady, 6 Cir., 1942, 128 F. 2d 496 [52-2 USTC ¶ 9550], and John M. Hirst & Co. v Gentsch, 6 Cir., 1943, 133 F. 2d 247 [43-1 USTC ¶ 9356].

"(c) Cases in which a penalty was involved. For example, Hill v Wallace, 259 U.S. 44, 42 S. Ct. 453, 66 L. Ed. 822 [1 USTC ¶ 65]; Lipke v Lederer, 259 U.S.

557, 42 S. Ct. 549 66 L. Ed. 1061 [1 USTC ¶ 67]; Regal Drug Corporation v Wardell, 260 U.S. 386, 43 S. Ct. 152, 67 L. Ed. 318 [1922 CCH ¶ 2074]; Allen v Regents of the University System of Georgia, 304 U.S. 439, 58 S. Ct. 980, 82 L. Ed. 1448 [38-2 USTC ¶ 9321].

"(d) Cases in which it was definitely demonstrated that it was not proper to levy the tax on the commodity in question, such as Miller v Standard Nut Margarine Company of Florida, 284 U.S. 498, 52 S. Ct. 260, 78 L. Ed. 422 [3 USTC ¶ 878].

"(e) Cases based upon tax assessments fraudulently obtained by the tax collector by coercion. For example, Mitsukiyo Yoshimura v Alsup, 9 Cir., 1948, 167 F. 2d 104 [48-1 USTC ¶ 9234].

"Our Court of Appeals has considered the scope of this section or its predecessor a number of times. Homan Mfg. Co., Inc. v Long, 264 F. 2d 158 (1959) [59-1 USTC ¶ 9269]; Melvin Building Corp. v Long, 262 F. 2d 920 (1959) [59-1 USTC ¶ 9126]; Mensik v Long, 261 F. 2d 45 (1958) [58-2 USTC ¶ 9943]; Steiner v Nelson, 259 F. 2d 853 (1958) [58-2 USTC ¶ 9871]; Homan Mfg. Co., Inc. v Long, 242 F. 2d 645 (1957) [57-1 USTC ¶ 9372]; Tovar v Jarecki, 173 F. 2d 449 (1949) [49-1 USTC ¶ 9218]; Tomlinson v Smith, 128 F. 2d 808 (1942) [42-2 USTC ¶ 9540]. The more recent decisions consistently refer to Homan Mfg. Co., Inc. v Long, 242 F. 2d 645 (1957) [57-1 USTC ¶ 9372] as declarative of the proper interpretation to be given the prohibition and the Supreme Court decisions construing it.

"It is clear that in order for this Court to declare § 7421(a) inapplicable, 'special and extraordinary circumstances' must combine with illegality of the tax, the collection of which is sought to be restrained. 242 F. 2d at 653.

"The decision in Steiner v Nelson, *supra*, applies the rule to a factual circumstance which is substantially similar to ours. There the Court said (at 858):

"[T]he taxing officials [were not relieved] of their statutory obligation to give plaintiffs notice before assessment and collection. From that it follows that the district court could, and properly did, bring its equity powers into play despite § 7421. [Citing the Homan case] Such notice is a condition precedent, and its absence invalidates the assessment."

"Thus, our Court of Appeals has declared that failure of the authorities to comply with the statutory conditions precedent to collection of a tax presents such

exceptional circumstance and so affects the legality of the attempted tax that the district courts may enjoin its collection."

The above-cited controlling decisions entitle the defendant in the case at bar to the following equitable reliefs:

a. That the court enjoin the collection of taxes for the fourth quarter of 1969, the first, second and fourth quarters of 1970, and the first, second and fourth quarters of 1971, and the first and second quarters of 1972;

b. That the court declare the liens filed against defendant's properties on May 19, 1972 and August 4, 1972 are void and illegal and should be immediately removed;

c. That the court declare that the levy and sale of defendant's properties in California were illegal and void ab initio.

PART IV

OPPOSITION TO THE MOTION OF
PLAINTIFF FOR A DECREE OF FORECLOSURE
AND JUDICIAL SALE AND THAT THE COURT
MAY RELIEVE DEFENDANT FROM THE ORDER
OF THIS COURT OF MAY 27, 1976

It is submitted that the order of this court entered on May 27, 1976, granting plaintiff's motion for the judicial sale of the real and personal property of defendant used by St. Andrew Academy should never have been made, and therefore it is respectfully submitted that the court should relieve defendant from the said order of May 27, on the following grounds:

1. The granting of such an order was a violation of the Constitutional right of defendant guaranteed by the Fifth Amendment of the United States Constitution, which states: "No person . . . shall be deprived of property without due process of the law." The court made such an order summarily without giving the new attorney of defendant time to study the important points of law and fact involved in the case. Indeed, there was no real trial of the issues involved and, therefore, there was no due process of the law.

It is a well established principle that the due process of the law means a fair trial of all

the points of law and fact involved, a hearing which is considered to be both sufficient and fair. When the Constitution requires a hearing, it requires a fair one. An opportunity must be given to present the view of the party regarding all the points of fact and law involved in the case. In this case, defendant was not given this opportunity of opposing the motion of plaintiff to sell her personal and real property;

2. An order for a judicial sale cannot be made before adjudicating all the matters involved between the plaintiff and defendant. § 7403(c) of the Internal Revenue Code (1954) states:

"(c) Adjudication and Decree.--The court shall, after the parties have been duly notified of the action, proceed to adjudicate all matters involved therein and finally determine the merits of all claims to and liens upon the property."

In any such action the court must adjudicate on all merits including the validity of the liens and the validity of assessments.

The court records in the case at bar contain an admission from the attorney of the plaintiff that the liens imposed by the Government on the property of defendant on May 18 and August 11, 1972, were not valid liens. This admission is recorded in the transcribed minutes of the meeting in the judge's chamber of February 6, 1976 (page 6), which states the following:

"MR. FERREL: Now, the Government will concede that the liens as allegedly stated for which notice of demand was given on May 18, 1972, and August 11, 1972, were not valid liens."

It is submitted that the defendant in this case is entitled to attack the merits of the tax assessment and to attack the merits of the liens and that this Honorable Court should scrutinize the assessments and the liens in all respects before giving an order for sale of the property.

The American Law Reports, annotated (100 ALR2d), page 869, states: "Sl. Introduction and scope. This annotation deals with the right of a taxpayer or his transferee to attack the merits of a tax assessment when an action is brought by the government under 26 USC Section 7403, to enforce a lien against the property encumbered with the lien, or when an action is brought by the taxpayer or his transferee to quiet title to or foreclose a mortgage on property against which the government claims a lien for taxes. . ."

On pages 870-872, the Reports summarize the law regarding the rights of defendants in a tax action to challenge the validity of the assessment and liens. It states:

"Section 2. Action by government to enforce lien.

"It appears now to be definitely established that in an action brought by the government to

enforce a lien under Section IRC § 7403, the merits of the tax assessment may be attacked, on the theory that if the government comes into a court to enforce a tax lien, it must be prepared to show the validity of the tax.

"The right of the defendant taxpayer, in an action brought against him by the government under § 7403 of the Internal Revenue Code (26 USC § 7403), to attack the merits of the tax assessment, was upheld in United States v O'Connor (1961, CA2 NY) 291 F2d 520, 100 ALR2d 858, the court overruling its earlier decision in Pipola v Chicco (1960, CA2 NY) 274 F2d 909, in which it was held that the grantee of a taxpayer, in an action brought under 28 USC § 2410 to cancel a government tax lien, could not attack the merits of the tax assessment, the court basing the prior decision on the assumption that the taxpayer, in an action under § 7403, had no right to attack the merits of the tax assessment. In support of its present decision the court cited two early Supreme Court decisions, which had not been called to its attention in the Pipola Case, in which it was held that when the government sues on a bond to secure payment of an assessment, the legality of the assessment is open for judicial determination. The court stated that the question was whether in a suit under § 7403 the assessment was conclusive, as it would be in a summary method of enforcement, or presumptive but inconclusive, as it would be in an action at law on the assessment or on a bond to secure its payment, and concluded that the closer analogy was to the action at law on the assessment. It was held, accordingly, that when the government seeks the aid of the courts in enforcing the assessment in any form, it opens the assessment to judicial scrutiny in all respects. The court also found support for its conclusion in the history of the legislation, noting that 26 USC § 7424, dealing with civil actions of third persons to clear title to property, contained an express provision that "the assessment of the tax upon which the lien of the United States is based shall be conclusively presumed to be valid," and pointing out that §§ 7424 and 7403 were at one time parts of the same section (Rev Stat § 3207(a)(b)), so that the absence of the quoted provision from the section involved in this action was more apparent then, when they were juxtaposed, than now, when they have been

separated. It was also noted that in the enactment of the 1954 Code the Senate had rejected a House amendment that would have inserted the "conclusive" language of §7424 into § 7403. It should be noted that while the government agreed that the taxpayer had the right to challenge the assessment in the present action under § 7403, it contended that the decision in the Pipola Case was nevertheless correct because of asserted differences between the rights of the taxpayer and of a third person, an issue which the court stated was not now before it.

"Although the case merely holds that an attachment lien filed against the taxpayer prior to the filing of the government lien for a tax assessment, but not reduced to judgment until after the effective date of the government lien, took priority over the tax lien (which holding was subsequently reversed by the United States Supreme Court), the court in United States v Aciri (1952, DC Ohio) 109 F Supp 943, affd (CA6) 209 F2d 258, revd on other grounds 348 US 211, 99 L ed 264, 75 S Ct 239, indicated that the taxpayer had the right to attack the assessment on its merits when it stated that even though it was stipulated that the only issue in the action was the question of priority of liens, an intent to admit the tax liability legally could not be attributed to the guardian of the taxpayer, and stated further that even if the court was of the opinion that there was priority in the tax lien of the government, full summary judgment could not be granted in view of the undetermined issue of the validity and the amount of the assessment.

"The right of a taxpayer to question the validity of assessments made against him for back income tax, allegedly based on the net worth theory, was upheld in United States v Ridley (1954, DC Ga) 127 F Supp 3, where the government brought a complaint in equity alleging the assessments on various properties and that various other persons were claiming an interest in such properties, and seeking to have the claims of all persons for liens thereon determined and adjudicated and that the government's lien be foreclosed as provided by law. The court pointed out that the commissioner's assessment was presumably correct, and that the burden of proof was upon the taxpayer to prove it erroneous and to establish all facts from which a correct determination could be made and, upon finding that the taxpayer had failed to sustain such burden, the government's lien was ordered enforced against the taxpayer's property.

"The right to attack the validity of an assessment on distilled spirits was upheld in United States v Rindskopf (1879, CC Wis) 8 Biss 507, F Cas No. 16166, where the government sought to reach property allegedly encumbered fraudulently by a distiller, the action being brought under a special statute authorizing a bill to be filed to enforce any lien which may exist against the property of a distiller, and which provided that the parties in interest should be made defendants in the action. The court pointed out that the assessment made was, prima facie, a valid assessment, and must be regarded as binding when made by the officers, as required under the law of the United States, but held that while this was so, the assessment was not conclusive against all parties, and concluded that it was competent for those who might not be directly affected by the assessment (the transferee of the property in this case) to contest the validity of the assessment. Upon its finding on the evidence that the assessment was invalid, the court concluded that it was unnecessary to determine the validity of the transfer, and that the bill must be dismissed."

The Reports summarize the rights to attack the merits of assessment. They state (pp. 873-874):

"Section 3. Action seeking to discharge lien.

(a) Right to attack merits of assessment recognized.

"It has also been held that the merits of the tax assessment may be attacked by the plaintiff in an action under 28 USC § 2410, which seeks to quiet title to property against which the government claims a tax lien.

"In denying a government motion to dismiss an action brought by the plaintiff to cancel a purported lien on the plaintiff's realty of certain tax penalties alleged to have been legally assessed against the plaintiff, the court in Falik v United States (1962, DC NY) 206 F Supp 181, indicated that a right to attack the merits of a tax assessment in such a proceeding did exist. The court upheld the plaintiff's contention that subject matter jurisdiction existed through the grant to the District Courts of jurisdiction over matters arising under the Internal Revenue Laws (28 USC § 1340), and that the United States had consented to the suit in the form plaintiff had chosen, by virtue of 28 USC § 2410, authorizing joinder of the United States in suits to quiet title where the

United States asserted a lien interest in property. The court pointed out that the plaintiff's attack was not on the government's lien-perfecting procedure, but on its administrative determination that the plaintiff was liable for the default of two corporations in performing their duties to pay withholding and social security taxes, the plaintiff alleging that while she had been an officer of the two defunct corporations, she was not a responsible officer in the operation of the business of either corporation. The plaintiff claimed that the liens were a cloud on her title that should be removed, and sought a judgment canceling them and vacating the underlying assessments as illegal. The court noted that while Pipola v Chicco (1960, CA2 NY) 274 F2d 909, appeared to bar the remedy plaintiff had chosen, this bar was removed by the later case of United States v O'Connor (1961, CA2 NY) 291 F2d 520, 100 ALR2d 858, pointing out that if the validity of the assessment could be made an issue in a suit to collect a tax under 26 USC § 7403 by enforcing a lien, such a tax could not be safe from scrutiny when the property owner takes the initiative under 28 USC § 2410 and, by so doing, invites a counterclaim under 26 USC § 7403. In upholding the plaintiff's right to maintain the action, the court stated that the plaintiff's suit required that there exist a power in the court to review the merits of the underlying assessment, and a power, if the assessment was bad, to expunge the cloud on the title represented by the government's lien.

"Similarly, in Sonitz v United States (1963, DC NJ) 221 F Supp 762, in denying a government motion to dismiss an action brought by the plaintiffs to quiet title to their property, the court indicated that the plaintiffs in an action under § 2410 had the right to challenge the validity of the assessment made against them. The plaintiffs were the daughter and widow of the original taxpayer and were transferees of certain property paid for by the taxpayer some 6 years prior to the assessment of the deficiency tax against him. It also appeared that the jeopardy assessment against the plaintiffs was not made until more than one year after the original tax assessment against their father and husband, and it was contended that the jeopardy assessment against the plaintiffs was therefore barred by the one-year statute of limitations imposed by 26 USC § 6901(c)(1), and it was also denied that the transferor was insolvent when the transfer was made. The court rejected a government contention that in a suit to quiet title under 28 USC § 2410 only procedural defects of the lien sought to be expunged could be examined by the court, and that the merits of the assessment underlying the lien, including procedural defects in such assessment, were not subject to inquiry. The government argued that the overruling

of the Pipola Case, by the O'Connor Case, was limited to cases involving a foreclosure action by the government under 26 USC § 7403, and that even if a taxpayer was permitted to question the assessment under § 7403, he was not permitted to question such an assessment under 28 USC § 2410. In rejecting this contention, the court held that since the taxpayer may inquire into the merits of an assessment in a suit by the government to enforce a tax lien, there was no reason to deny the taxpayer this right in an action which he brings under 28 USC § 2410 to expunge such a lien."

In view of the above controlling decisions, it is submitted that the court could not give an order for the sale of the property of defendant unless it adjudicate all matters involved in this litigation, and inquire into the validity of the assessment and liens and, therefore, a relief from the order of this court of May 27, 1976 should be granted.

3. The plaintiff submitted the motion for the judicial sale of real and personal property of defendant pursuant to Articles 69 and 70 of the Rules of Civil Procedure of the United States District Court and pursuant to 28 U.S.C., §§ 2001, et seq.

Article 69 of the Rules of Civil Procedure deals with the execution of judgment but the execution of judgment in this Rule must be interpreted in accordance with Rule 58 and 79 of the abovementioned Rules. Rule 58 states: "A judgment is effective only when so set forth and when entered as provided in Rule 79." Rule 79 prescribes that the judgment should be docketed and paragraph (b) of Rule 79 states: "The clerk shall keep, in such form and manner as the Director of the Administrative Office

of the United States Courts with the approval of the Judicial Conference of the United States may prescribe, a correct copy of every final judgment or appealable order, or order affecting title to or lien upon real or personal property, and any other order which the court may direct to be kept."

This means that the execution of the judgment of this court of February 9, 1976, or the judgment of this court of May 7, 1976 can only be made after they have become final and are docketed in accordance with Rule 79 of the abovementioned Rules.

How can these two judgments of February 9 and May 7, 1976 be final if they were made to be subject to correction and that they were based on a stipulation which is invalid and must be set aside.

4. It is submitted further that the order of sale of May 27, 1976, should not have been made because it violates the constitutional and human rights of defendant and inflicts a great hardship on the defendant and on 500 students and 40 teachers, without any justification. Defendant has always been ready and willing to come to an arrangement with the Government for the payment of the taxes due. It is only because of the illegal action committed by the IRS that she was unable to do so.

PART V

STATEMENT OF ACCOUNTS

The controlling decisions hereinbefore cited establish that the taxpayer has the right to challenge the merits of the assessment underlying the asserted lien, by showing that it is erroneous, excessive, illegal or barred by the Statute of Limitations.

The collection of taxes for the first and second quarters of 1969 (Exhibit 1, page 1) which plaintiff claims to have assessed on October 28, 1974, is barred by the Statute of Limitations. The returns were filed early in 1969, but the assessment was only made on the 28th of October, 1974, after the elapse of three years. Therefore, the collection of these taxes, and the penalties and interest in respect thereof, are barred by the statute.

The collection of taxes for the seven quarters, namely 4Q69, 1Q70, 2Q70, 4Q70, 1Q71, 2Q71 and 4Q71 (Exhibit 1, page 1) must be enjoined as no notices or demands were made in respect thereof in violation of the statutes.

Penalties can only be imposed if there were proper assessments and notice and demand for payment and the taxpayer either refuses or neglects to pay. It has been established beyond any shadow of doubt that no such notices and demands were made. As the collection of taxes should be enjoined it follows that the collection of penalties and interest in respect thereof should also be enjoined.

Defendant submits herewith at the end of Part V, a STATEMENT OF ACCOUNT (EXHIBIT NO. 1), showing the WH/FICA taxes due from the defendant for certain quarters of the years 1972, 1973 and 1974, and the FUTA for the years 1969, 1970, 1971 and 1972. The said Statement also shows the details of payments by and credits which should be given to defendant. The following are explanations of the said STATEMENT OF ACCOUNT:

- "1. The taxes for the 4Q72 were \$16,434.00. The payments and credits before or during 1972 which should be applied to the payment of this tax total \$26,689.14 (see details of all payments and credits, page 2 of the STATEMENT).
2. The total taxes due for the 1Q73 and 2Q73 was \$29,892.45. The total credits to and payments by defendant for the year were \$25,248.01 (see details in STATEMENT). If we add to these credits the overpayment of 1972, which was \$10,255.14, the total credits to payments by defendant which should be applied against these taxes of 1973 will be $\$25,248.01 + \$10,255.14 = \$35,503.15$. If we deduct the amount of taxes due for the Government for 1973, which is \$29,892.45, the balance of credit in favor of defendant for 1973-1974 will be \$5,610.70.
3. The total taxes due to the Government for the 2Q74, 3Q74, 4Q74 is \$33,150.00.

The total credits to and payment by defendant

for the year 1974 was \$31,586.16 (see details in STATEMENT, p. 2). To this credit must be added \$5,610.70, as explained in the preceding paragraph, making total credits in favor of defendant \$31,586.16 + \$5,610.70 = \$37,196.86. If we deduct the tax due for 1973 amounting to \$33,150.00 from the total payments and credits of \$37,198.85, the total credits in favor of defendant will be, in 1974, the sum of \$4,048.85, which should be applied against FUTA taxes.

4. The total FUTA taxes for 1969, 1970, 1971 and 1972 is \$17,420.06. If we deduct from this sum the balance of credits in favor of defendant amounting to \$4,048.85, defendant will be, at the end of 1974, owing the Government the sum of \$13,371.21.

5. The defendant has kept current in payment of her taxes for the years 1975 and 1976.

6. Penalties and Interest for 1972, 1973, 1974:

Penalties: It is submitted that plaintiff is not entitled to impose penalties on defendant for the abovementioned years because defendant was always willing to pay her taxes. She was unable to do so because of the invalid liens placed by plaintiff on defendant's properties in May and August, 1972, in violation of the laws and regulations relating to the assessment and collection of taxes, and therefore plaintiff is not entitled to impose or collect these penalties.

Interest: Defendant submits that collection of interest regarding the aforementioned periods should also be enjoined because defendant was always willing to pay the taxes due. Defendant pleaded during 1972, 1973, and 1974 with agents of the IRS to remove the invalid and illegal liens to enable her to obtain a mortgage on her property and obtain loans to pay all taxes due, but the IRS agents refused to do so. Consequently the non-payment of taxes was the result of the violations of the laws and regulations by the IRS agents and, therefore, they should not benefit from their wrongful acts, in accordance with the maxim, ex factis jus oritur.

STATEMENT OF ACCOUNT: EXHIBIT NO. 1

Page 1

<u>Taxable Period</u>	<u>Type of Tax Form # of Return</u>	<u>Date of Assessment and Notice and Demand</u>	<u>Assessed Tax</u>	
1Q69	WH/FICA 941	10-28-74	\$ 9,271.70	)
2Q69	WH/FICA 941	10-28-74	9,271.70	)
				) Barred by the Statute of Limitations
4Q69	WH/FICA 941	5-16-72	11,382.31	)
1Q70	WH/FICA 941	5-16-72	11,824.08	)
2Q70	WH/FICA 941	5-16-72	11,161.93	)
4Q70	WH/FICA 941	5-16-72	13,089.38	)
1Q71	WH/FICA 941	5-16-72	14,907.50	)
2Q71	WH/FICA 941	5-16-72	13,392.24	)
4Q71	WH/FICA 941	5-16-72	15,234.01	)
				) Collection must be enjoined for violations of the laws and regulations, and no notice or demand

STATEMENT OF ACCOUNT: EXHIBIT NO. 1

Page 2

<u>Taxable Period</u>	<u>Type of Tax Form # of Return</u>	<u>Date of Assessment and Notice and Demand</u>	<u>Assessed Tax</u>	<u>Payments & Credits</u>	<u>Explanation</u>
4Q72	WH/FICA 941	7-09-73	\$16,434.00	\$ 6,493.02 7,281.55 1,346.23 1,500.00 2,000.00 1,300.00 1,805.00 1,800.00 3,163.34	5-05-67 - overpayment 9-06-68 - overpayment 9-28-70 - IRS Bank Levy 9-29-70 - IRS Bank Levy 9-15-72 - payment by check 8- -72 - Levy on Calif. rents 10-15-72 - payment by check 10-31-72 - payment by check
			\$16,434.00	\$26,689.14	- overpayment
1Q73	WH/FICA 941	9-17-73	\$17,886.68	\$12,829.60 153.60	1-31-73 - payment by check 4-19-73 - payment by check
2Q73	WH/FICA 941	10-01-73	12,005.77	153.60 4,752.88 105.44 5,510.87 1,742.02	4-19-73 - payment by check 5-14-73 - payment by check 6-03-73 - payment by check 6-15-73 - payment by check 7-30-73 - payment by check
		TOTAL	\$29,892.45	\$25,248.01	
2Q74	WH/FICA 941	8-05-74	\$ 5,302.67	\$ 5,000.00	4-01-74 - payment by check
		10-28-74	6,519.55	15,809.25	1-31-75 - payment by check
3Q74	WH/FICA 941	12-23-74	4,634.22	824.31 276.60	1-31-75 - payment by check 5-05-75 - payment by check
4Q74	WH/FICA 941	3-24-75	16,633.56	7,101.00	7-15-75 - Proceeds - property in Calif.
			17,003.85	2,575.00	7-01-75 - proceeds - land in Calif.
			\$33,150.00	\$31,586.16	

STATEMENT OF ACCOUNT: EXHIBIT NO. 1

<u>Taxable Period</u>	<u>Type of Tax Form # of Return</u>	<u>Date of Assessment and Notice and Demand</u>	<u>Assessed Tax</u>
1969	FUTA 940	11-18-74	\$ 3,846.47
1970	FUTA 940	11-18-74	4,660.70
1971	FUTA 940	11-18-74	4,105.32
1972	FUTA 940	11-18-74	<u>4,807.57</u>
			\$17,420.06

PART NO. VI

DEFENDANT WAS DEPRIVED OF HER
CONSTITUTIONAL RIGHT TO A FAIR TRIAL

The Fifth Amendment of the United States Constitution states:

"No person shall be deprived of life, liberty or property, without due process of law."

Many of the hearings of motions in this case were made when defendant, who is a layman, had no counsel, and therefore, she was deprived of her right to a counsel, even when she was facing contempt charges and was sentenced to three days in prison for contempt.

Several of the motions were heard and orders were made and judgments were entered when defendant was not represented by counsel.

The following are some examples where defendant was denied her right to the due process of the law:

1. The trial of the case was set for February 20, 1976. On the 6th day of February, the parties were supposed to continue with the depositions in which several important facts were established that agents of the IRS violated the laws and regulations regarding notices and demands and prompt assessment. Suddenly, due to an arrangement between the previous attorney of defendant, Peter Newman, and the attorney of the plaintiff,

for reasons unknown to defendant, they told defendant that a settlement would be made, and hurried the defendant to the judge's chamber. No real settlement was made because no accounts were made, and no compromise was made. Instead, defendant was adjudged to pay the sum of \$275,000, which included taxes barred by the Statute of Limitations, and taxes which should have been enjoined and excessive penalties and undue interest, thereby ignoring and avoiding all points of law and fact established in the depositions. This was not a settlement but a stipulation obtained by misrepresentation;

2. On September 17, 1975, attorney of defendant, Mr. Brotman, withdrew from the case. Defendant requested an adjournment for the hearing of the motion to grant a preliminary injunction, which was set for the 19th of September, 1975. The court refused to adjourn the motion. On September 19, 1975, the defendant appeared in the court without a counsel, and the court granted the injunction;
3. On the 7th day of May, 1976, defendant went to the court to answer three motions, one for contempt of court, the second for judicial sale of her property and the third for correction of the

judgment which was entered on the 7th day of February, 1976. As soon as the case was called, attorney of the defendant, Peter Newman, presented his motion to withdraw from the case, which was immediately granted. Thereupon the court raised the amount of the judgment from \$275,000 to \$296,000. Defendant was to be committed to prison for three days unless she paid on the 14th of May the taxes due for the first quarter of 1976 and fixed the motion for judicial sale for the 27th of May, 1976. This procedure is contrary to the principle of due process and to controlling decisions.

a) Petition of Green, Ohio 1962, 82 S.Ct. 1114, 369 U.S. 689, 8 L.Ed. 2d 198.

It was held: "Procedural due process requires that one charged with contempt of court be advised of charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses in his behalf, either by way of defense or explanation."

Also, Petition of Curtis, D.C.Mo. 1965, 240 F.Supp.475, affirmed 362 F.2d 999, certiorari denied 87 S.Ct. 857, 386 U.S. 914, 17 L.Ed 2d 787, rehearing denied 87 S.Ct. 2072, 387 U.S. 949, 18 L.Ed. 2d 1341.

"Due process requires not technical accuracy but that person charged be advised of charges against him, have reasonable opportunity to meet them

by way of defense or explanation, have right to be represented by counsel and have chance to testify and call witnesses in his behalf, either by way of defense or explanation." Id.

4. Defendant retained a new attorney, Mr. Gene Crescenzi, on May 14, 1976. Defendant was unable to give her new attorney all the documents because Mr. Newman refused to give her the documents. In the circumstances, defendant's new attorney sent a letter dated 5/17/76 to the honorable Judge requesting that the motion for judicial sale fixed for the 27th of May, 1976, be adjourned to enable the new attorney:

- a) To study the facts of this case and the points of law involved and that due to his schedule, it is impossible for him to adequately defend the interests of his client without such an adjournment;
- b) To study the merits of the accounts involved and the amounts due from defendant to plaintiff;
- c) To consult with the defendant and other parties with view to raising sufficient amounts of money either through a mortgage or a bond and consult with attorney of plaintiff with view to ensuring the payment of any amount which may be finally determined by the Court.

In spite of all these important reasons, the court did not adjourn the case and defendant's new attorney attended the hearing which was held on the 27th of May, 1976. The Court gave an order for sale of defendant's property.

It is submitted that this is not a fair trial. The defendant is being deprived of her property, an Academy with five hundred (500) students and forty (40) teachers are being jeopardized without due process of the law.

PART VII

A SCHEME TO CLOSE ST. ANDREW ACADEMY

It is s-bmitted that some agents of the IRS were scheming in bad faith and in violation of the law to close St. Andrew Academy and destroy this important educational institution under the auspices of the Archdiocese of the Greek Orthodox Church of North and South America.

This campaign of persecution, of violating the laws, placing invalid liens on the properties of defendant, the sale of the properties in California for less than 1/10 (one-tenth) of their value, is part of a scheme to destroy the Academy and violate the civil, religious and human rights of the defendants, and deprive 500 students of the pursuit of their education in an important Academy, and deprive 40 teachers of their livelihoods.

Agents of the IRS know the importance of the Academy for the Greek Orthodox Diocese, and yet they violated the laws, harassed the defendant and declared their intention openly--that they want to close the Academy.

The following are examples of the prejudice and persecution demonstrated by some agents of the IRS:

1. Group Manager of the IRS, of the name of Scotti, visited the Academy with several officials and told defendant outside the Academy: "We want to shackle your school";
2. Special Procedures official, Mr. Marcades, once

told defendant: "We are determined to close your business";

3. Mr. Keenan, Chief, Collection of the IRS Brooklyn Office, once threatened defendant by stating: "We finished with your California property; now we are moving on your School";
4. When the new attorney of defendant met attorneys of plaintiff to discuss the possibilities of an adjustment of this matter, Mr. Mobyed said: "Not even if the Greek Government would come up tomorrow to pay \$300,000 would we accept it. However, the court might take other action. Miss Tassop is just not a person who can do business with the IRS and follow its rules and regulations."

It is submitted that this campaign to close the Academy is unjustified, contrary to public policy and to public welfare and is suspiciously suggestive of "real estate churning" under color of law.

The defendant and her mother have been running the school since 1953, and always paid their taxes. She always kept current with the exception of the short period subject of this litigation. Had agents of the IRS not placed the illegal liens on her property, she would have been able to settle this problem and pay the taxes.

Defendant is at the present time keeping current with the payment of her taxes. Isn't it a fact that most schools in the country are either subsidized by the Government or

given grants and aids? Can the plaintiff state that Jewish community schools or Catholic schools or Protestant schools are keeping current with the payment of all their taxes? Defendant knows many schools which, even receiving grants and aid, are unable to keep current with their taxes, and they have not been subjected to this harassment and to this persecution.

It is submitted that there is, in this case, discrimination against the defendant because of her ethnic origin and because of her religious faith, and that this discrimination violates her human rights and her constitutional rights.

PART VIII

PUBLIC LAW AND POLICY RESPONSIVE TO
TREATIES ARE THE SUPREME LAW OF THE
LAND. (UNITED STATES CONSTITUTION,
ARTICLE 6, SECTION 2.)

The defendant in its character as a school operating under the authority of the Greek Orthodox Archdiocese of North and South America is a beneficiary of the public law and policy established between the United States of America and the Government of Greece pursuant to protocols and standards of international comity among sovereign nations.

In this regard, the United States honors an agreement of mutual and reciprocal understanding between the peoples of the United States of America and Greece.

The Greek Government has by law on May 10, 1961,

ordered that the St. Andrew School be accredited on the same standards as the public high schools of Greece as of September, 1960.

In support of the reciprocal recognition and esteem between the two nations, a treaty on the subject of education, a copy of which is annexed hereto and made a part hereof as if the same were set forth herein at length, dated December 13, 1963, states the conditions applicable between Greece and the United States of America with a view to enhance a wider exchange of knowledge and professional talents through educational activities.

It would appear that Title 26, U. S. Code, Section 7852...(d) is a provision of law intended to honor the supremacy of treaty obligations to be applied in the administration of the Internal Revenue Code in the following language:

(d) Treaty obligations.--No provision of this title shall apply in any case where its application would be contrary to any treaty obligation of the United States in effect on the date of enactment of this title. Aug. 16, 1954, c. 736, 68A Stat. 922.

The inescapable result of granting plaintiff's motion to foreclose and sell the school buildings would be to destroy the school, which result is contrary to the said treaties.

PART IX

THE UNITED STATES OF AMERICA IS A
GUARANTOR OF SCHOOLS OPERATED UN-
DER THE DIRECTION OF ITS RECOGNIZED
RELIGIOUS INSTITUTIONS.

The public policy of the United States, as a guarantor of the support of schools under the direction and authority of recognized religious institutions, is in the nature of a partnership.

This partnership between the United States and the Roman Catholic Church has been given written expression in the treaty of Guadalupe Hidalgo, dated February 2, 1848. It is respectfully suggested that the Greek Orthodox Religion is entitled to equal conditions of guaranty and support by the plaintiff herein.

Article 9 of the said treaty states the following:

"The same most ample guaranty shall be enjoyed by all ecclesiastics and religious corporations or communities, as well in the discharge of the offices of their ministry, as in the enjoyment of their property of every kind, whether individual or corporate. This guaranty shall embrace all temples, houses and edifices dedicated to the Roman Catholic worship; as well as all property destined to it's support, or to that of schools, hospitals and other foundations for charitable or beneficent purposes. No property of this nature shall be considered as having become the property of the American Government, or as subject to be, by it, disposed of or diverted to other uses.

"Finally, the relations and communication between the Catholics living in the territories aforesaid, and their respective ecclesiastical authorities, shall be open, free and exempt from all hindrance whatever, even although such authorities should reside within the limits of the Mexican Republic, as defined by this treaty; and this freedom shall continue, so long as a new demarcation of ecclesiastical districts shall not have been made, conformably with the laws of the Roman Catholic Church."

The said treaty has been implemented by the United States Government in litigation in 1902 before the Hague Tribunal (World Court) resulting in an award of \$1,420,682.00 on behalf of the Roman Catholic Hierarchy of California, in addition to a perpetual annuity of \$43,050.00 against the Government of Mexico.

The written partnership between the Roman Catholic Church and the United States of America was further honored and enhanced in litigations before the United States Land Commission, which awarded land to the Roman Catholic Church which it had "purchased" from the Government of Mexico.

The public policy of the United States of America, if it is to be equally applied, must likewise honor the partnership relation between the defendant St. Andrew School as an instrument of the Greek Orthodox Archdiocese of North and South America with the same guaranty of financial and other support in the same manner. It is respectfully submitted

that the conflicting principles can be resolved only by the application of Title 26, U. S. Code, Section 7852...(d); that is, the plaintiff be denied its application for foreclosure and sale of the real and personal property owned by the defendant Greek Orthodox Religious School.

CONCLUSION

For the foregoing reasons and submissions and upon the above-cited controlling decisions, defendant-appellant respectfully requests the United States Court of Appeals to set aside the judgment of the United States District Court, Eastern District of New York, dated July 27, 1977, for the foreclosure of the federal tax liens and the recent sale of the real property in the name of Tassop Realty Inc., which is housing St. Andrews Academy on the Sound, and also to set aside and vacate the order of the same court of the same date in which the court amended the judgment entered on February 7, 1976, as amended on May 27, 1976 and return this case for a new trial on the merits by the United States District Court allowing the defendant-appellant to continue discovery which was aborted by the maneuvers and deceit in obtaining the consent judgment of the 6th of February, 1976.

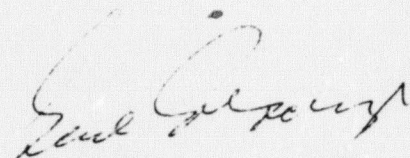
Furthermore it is respectfully requested that the United States Court of Appeals should order the following:

1. That the defendant-appellant should be relieved of the stipulation entered into on February 6, 1976 on the grounds of mistake, inadvertence, and intrinsic and extrinsic misrepresentation by the previous attorney of defendant-appellant and by the attorney of the plaintiff-respondent;
2. That in view of the violation of the law,

regulations and procedures for the collection of taxes and liens by the IRS, it is respectfully submitted that the United States Court of Appeals grant the defendant-appellant the following relief:

- a) That the collection of taxes for the fourth quarter of 1969, the first, second and fourth quarters of 1970, and the first, second and fourth quarters of 1971 and the first and second quarters of 1972 be enjoined;
- b) That the liens filed against defendant-appellant's properties on May 19, 1972 and on August 4, 1972, were void and illegal and that the levy and sale of defendant-appellant's properties in California were illegal and void ab initio;
- c) That defendant-appellant should be relieved from all penalties imposed by plaintiff-respondent in view of the fact that plaintiff-respondent violated the laws, regulations and procedures pertaining to collection of taxes and liens thereby preventing defendant-appellant from raising money to pay the taxes and thus greatly prejudiced

the rights of the defendant-appellant
together with such other relief as
may be just.

A handwritten signature in cursive script, appearing to read "Gene Crescenzi", is written above the typed name.

GENE CRESCENZI
Attorney for Defendant
415 Lexington Avenue
New York, N.Y. 10017
(212) MU 2-1686

COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff,

- against -

HELEN K. TASSOP, et al.,

Defendants.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF

SS.:

I, James A. Steele being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at 112 West 136th Street; New York, New York

That on the 30th day of January 19 78 at 225 Cadman Plaza
Brooklyn, New York

deponent served the annexed

upon

~~Appendix~~

Brief

David Trager: U.S. Attorney Eastern Dist.

the in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein,

Sworn to before me, this
day of January, 19 30th
78

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1979

James A. Steele
James A. Steele

